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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MICHELLE C., a Person Coming Under the Juvenile Court Law.	D044991
IMPERIAL COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. MARIA F., Defendant and Appellant.	(Imperial County Super. Ct. No. 19352)
In re MARIA F. on Habeas Corpus.	D045491 ORDER MODIFYING OPINION **[NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the majority opinion filed herein on June 23, 2005, is modified as follows:

1. On page 12, delete the last sentence, which includes footnote 6, and insert the following sentence in its place:

> We conclude that in this case, proceeding with the selection and implementation hearing in the absence of Maria and her counsel violated Maria's constitutional right to due process.

The deletion of footnote 6 will require renumbering of all subsequent footnotes.

2. On page 15, the following is inserted after the first sentence of the second paragraph:

> Although the dissent maintains that "a parent's rights at the section 366.26 hearing are significantly diminished compared to the fundamental parental rights at stake during the dispositional process" (Dis. opn., *post*, p. 3.), it is worth noting what does remain at stake for a parent at the section 366.26 hearing. At issue at the 366.26 hearing is whether adoption will be ordered, or rather, whether one of the statutory exceptions to adoption applies, and thus another disposition such as guardianship or long-term foster care is appropriate. (§ 366.26, subd. (b).) Only adoption entails the termination of parental rights. The right to custody of a child is but one aspect of the complex concept we know as the "parent-child relationship," since it is undeniable that a parent's interest in the parent-child relationship goes beyond an interest in having custody of a child. As one commentator has succinctly described it, the essence of the right to a parent-child relationship recognized by courts is, more fundamentally, "the right to know and be known by one's child." (Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father* (1999) 41 Ariz. L. Rev. 753, 757.) Thus, the parent continues to have a strong interest in the fundamental right to "maintain the parent-child bond" (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419), even after reunification services have ended.

3. On page 15, the last sentence that continues on page 16, beginning with the words "We conclude that under the circumstances in this case," is modified to delete the phrase "both from statutes (§§ 317 and 366.26, subds. (f)(1) and (f)(2)) and," so that the sentence reads:

> We conclude that under the circumstances in this case, the court deprived Maria of her right to the assistance of counsel at the section

> 366.26 hearing as derived from the United States Constitution (see *In re O.S., supra*, 102 Cal.App.4th at p. 1407; see also *In re Kristin H., supra*, 46 Cal.App.4th at p. 1659).

4. On page 16; in the paragraph under heading number 2, the first sentence is modified to read as follows:

> What makes the circumstances of this case unique is that in going forward with the section 366.26 hearing in the absence of both Maria and her attorney, the court deprived Maria of *any* meaningful opportunity to be heard in the matter, and thus denied Maria her constitutional right to due process of law.

The footnote at the end of the sentence remains, but the citation in the footnote is modified by replacing "(1994)" with the word "*supra*."

5. On page 21, in the first paragraph, in the sentence beginning "We have found two cases . . . ", the word "two" is changed to "three," and the citation *In re Andrew S.* (1994) 27 Cal.App.4th 541 (*Andrew S.*) is added following the *In re Malcolm D.* citation, so that the sentence reads:

> We have found three cases in which other appellate courts have applied a harmless error analysis to errors that effectively resulted in one-sided termination proceedings. (See *In re Angela C.* (2002) 99 Cal.App.4th 389 (*Angela C.*); *In re Malcolm D.* (1996) 42 Cal.App.4th 904 (*Malcolm D.*); *In re Andrew S.* (1994) 27 Cal.App.4th 541 (*Andrew S.*).)

6. On page 21, the last sentence of the first paragraph beginning "However, for a number of reasons," is modified so the sentence reads:

> However, for a number of reasons, we find these cases distinguishable from the present case.

7. On page 25, the last part of the second full paragraph, beginning with the words "Under this reasoning," is deleted and replaced with the following:

> Under this reasoning, it is only when a parent has been prejudiced *and* can show that the proceeding was fundamentally unfair that the court will conclude that the parent even had a constitutional right to counsel at that particular hearing. The flaw in this analysis is two-fold: It combines the determination of whether a particular court error violated a party's constitutional right with the secondary determination whether such error must be reversed, and allows the results of "fundamentally unfair" proceedings to be affirmed if the parent cannot also establish prejudice.

8. On page 26, at the end of the first paragraph, after the sentence ending "should be reviewed under a harmless error standard, we disagree," add the following new paragraphs:

> In a situation similar to that presented in *Malcolm D.*, the trial court in *Andrew S., supra*, 27 Cal.App.4th at page 546, granted an attorney's request to be relieved as counsel for the child's mother just prior to the section 366.26 hearing, despite the fact that the mother was not present and was otherwise unrepresented at the hearing. According to the attorney, the mother had complained after the previous hearing that she had not been properly represented and that she intended to hire a new attorney. (*Ibid.*) Several lawyers had telephoned the attorney, saying that they were going to represent the mother, and although no formal substitution was presented to the court, the mother's attorney sought to be relieved on the basis of a conflict of interest. (*Ibid*.)
>
> The appellate court in *Andrew S.* determined that the trial court's actions had erroneously deprived the child's mother of her right to counsel. (*Andrew S., supra*, 27 Cal.App.4th at p. 546.) However, like the appellate court in *Malcolm D.*, the *Andrew S.* court concluded that the trial court had violated only the mother's statutory right to counsel, and not her constitutional due process rights. (*Andrew S., supra*, 27 Cal.App.4th at p. 549.) The *Andrew S.* court then reviewed the error for prejudice, and determined that no prejudice had been shown. (*Ibid*.)
>
> As in *Malcolm D.*, in concluding that the trial court's error was not of constitutional dimension, the *Andrew S.* court failed to consider whether the mother's right to a meaningful opportunity to be heard had been affected by the trial court's decision to go forward with the

> section 366.26 hearing immediately after relieving her attorney. Further, the trial court in *Andrew S.* had made an express finding that the mother had "purposefully absented herself from the hearing." (*Andrew S., supra*, 27 Cal.App.4th at p. 546.) There was no similar finding here. Because the courts in *Malcolm D.* and *Andrew S.* failed to consider whether the mother's due process right to a meaningful opportunity to be heard had been implicated, we find these cases of little persuasive valued in assessing the nature of the error that occurred in this case.
>
> To the extent *Andrew S.* suggests that the right to counsel is never "a right of constitutional dimension at a section 366.26 hearing," we disagree. (*Andrew S., supra*, 27 Cal.App.4th at p. 546.) As the *Lassiter* court made clear, whether or not there is a constitutional right to counsel at a particular hearing is to be determined on a case-by-case basis because in each case, the "'facts and circumstances . . . are susceptible of almost infinite variation . . . .' [Citation.]" (*Lassiter, supra,* 452 U.S. at p. 32.) We conclude that under the facts and circumstances of this case, Maria possessed constitutional rights that were violated by the trial court's decision to go forward with the section 366.26 hearing, particularly in view of the nature of the right at stake.

9. On page 26; in the second paragraph, in the sentence beginning "In our view, the paucity of cases," the word "indicates" is changed to "underscores."

10. On page 27, the last sentence in the first paragraph beginning "where the parent has not waived" is deleted, and the comma after the word "present" is changed to a period, so the sentence reads:

> What the court may not do is run roughshod over the parties' fundamental rights to notice and a meaningful opportunity to be heard, by proceeding to terminate parental rights when neither the parent nor her attorney are present.

11. On page 27, the second sentence in the first full paragraph is deleted.

12. On page 27, the paragraph beginning "The court's error in this case," is included in the previous paragraph after the words "called into question."

Justice Benke's dissent in the above opinion filed on June 23, 2005, is modified as follows:

At the first paragraph of the dissent beginning with "My colleagues" and ending with "no such risk." (dissent slip opn. p. 1) delete the entire paragraph and replace it with the following:

I respectfully dissent.

With admirable vigor my colleagues have doggedly asserted Maria's right to maintain a parental relationship with her daughter, Michelle. With due respect, in their vigor to protect Maria's interests I fear my colleagues have ignored Michelle's. As the court in *In re Jasmon O.* (1994) 8 Cal.4th 398, 419, instructed us: "Children, too, have fundamental rights -- including the fundamental right to be protected from neglect and to '*have a placement that is stable [and] permanent.*' [Citations.] Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent. [Citation.] (Italics added.)"

Because in any dependency proceeding courts are required to consider the ever fluid and sometimes conflicting interests not just of a parent and the state, but of a parent, the state and *a developing child*, it is not surprising the Supreme Court of the United States as well as our own California Supreme Court and sister Courts of Appeal have consistently avoided rigid application of the categorical rules and remedies found in criminal proceedings. (See *Lassiter v. Department of Soc. Serv. of Durham Cty.* (1981) 452 U.S. 18, 31-32 [101 S.Ct. 2153] (*Lassiter*); *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 253-256 (*Cynthia D.*); *In re Andrew S.* (1994) 27 Cal.App.4th 541, 548-550

(*Andrew S.*); *In re Malcolm D.* (1996) 42 Cal.App.4th 904, 921 (*Malcolm D.*) The social cost of providing a criminal defendant with what might appear to be extraordinary procedural protection is easily outweighed by the high value we place on personal liberty and the need to restrain a powerful government. The calculus is not so easy when the interests at stake include those of a growing child.

Thus, I cannot help but believe that a fuller appreciation of Michelle's rights by the majority would have produced a more faithful application of the case-by-case analysis of the right to counsel required by *Lassiter*. Indeed, it is striking that in finding a constitutional right to counsel in the context of a termination of parental rights, the majority acknowledges it is in direct conflict with the holdings in *Andrew S.* and *Malcolm D.,* which in applying the very same *Lassiter* principles found that due process did not require counsel at the selection and implementation hearings on review in those cases. My colleagues justify their *sui generous* application of *Lassiter* by suggesting that unlike the courts in *Andrew S.* and *Malcolm D.* they have considered "whether the mother's right to a meaningful opportunity to be heard had been affected" by the trial court's decision. (Majority modification at slip opn. p. 26.) I do not accept their narrow reading of those cases. More importantly, however, I do not accept their complete failure to consider, let alone discuss, Michelle's rights.[1]

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[1] It bears noting that the distinct rights of minors in our dependency scheme are fully set forth in *Cynthia D.* and that in finding no constitutional right to counsel at a selection and implementation hearing, the court in *Andrews S.* relied largely on *Cynthia D.* (See *Andrew S., supra,* 27 Cal.App.4th at pp. 548-549.) Thus one would

Prior to the Roman "I" heading (dissent slip opn. p. 1) insert and center the word DISCUSSION

At Discussion I, the first sentence (dissent slip opn. p. 1), delete the full *Lassiter* citation and refer to the *Lassiter* case with its short cite so that the phrase reads *Lassiter* sets forth

At Discussion I, A, following the end of the first sentence of the first paragraph (dissent slip opn. p. 3) insert the following citation: (*Andrew S.*, *supra,* 27 Cal.App.4th at p. 547.)

At Discussion I, A, following the end of the second sentence of the first paragraph (dissent slip opn. p. 3) insert the following citation: (*Id*. at p. 548.)

At Discussion I, A, following the end of the third sentence of the first paragraph (dissent slip opn. p. 3) correct the citation reference of *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 253-256 (*Cynthia D.*) to read (*Cynthia D.*, *supra,* 5 Cal.4th at pp. 253-256.)

At Discussion I, A, following the *Cynthia D.* citation (dissent slip opn. p. 3) correct the full cite reference of *In re Jasmon O.* to read *In re Jasmon O.*, *supra,* 8 Cal.4th at p. 420.

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expect that in articulating its divergence from *Andrew S.*, the majority opinion would discuss *Cynthia D.*

At Discussion I, A, in the third paragraph prior to the citation of *In re Malcolm D.* (dissent slip opn. p. 4) insert the following citation *Andrew S., supra,* 27 Cal.App.4th at pp. 548-549;

At Discussion I, A, after inserting the *Andrew S.* citation (dissent slip opn. p. 4) correct the citation reference of *In re Malcolm D.* to read *Malcolm D.*

At Discussion I, C, following the last sentence of the last paragraph ending with "over three years old." (dissent slip opn. p. 9) insert the following paragraph: In short, like the courts in *Andrew S.* and *Malcolm D.*, I conclude Maria had no constitutional right to counsel at the selection and implementation hearing.

At Discussion II (dissent slip opn. pp. 10-12) delete all of Discussion II and renumber Discussion III as Discussion II.

At renumbered Discussion II, before first sentence of the first paragraph beginning with "In summary" insert the following new paragraph: Because Maria had no constitutional right to counsel at the selection and implementation hearing, the trial court's error in proceeding without counsel is governed under the familiar *Watson* standard. (*Malcolm D., supra,* 42 Cal.App.4th at 919.) "Thus, the question is whether it is reasonably probable a result more favorable to the mother would have been reached in the absence of the court's error." (*Ibid.*) Because counsel would not have been determinative, it is axiomatic that the presence of counsel would not have materially improved the likelihood of a more favorable result.

At Discussion II, the now-second paragraph, first sentence (dissent slip opn. p. 12) correct the short cite reference to *Fulminante* to read *Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct. 1246].

At Discussion II, the now-second paragraph, second sentence beginning with "Rather" and ending with "analysis." (dissent slip opn. p. 12) should be deleted.

[NO CHANGE IN THE JUDGMENT.]

BENKE, Acting P. J.

AARON, J.

NARES, J.